SUPREME COURT, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

KIN SIU TAM, M.D.,

Petitioner

versus

STATE OF GEORGIA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

THOMAS M. WITCHER
Counsel of Record
118 East Trinity Place
Decatur, GA. 30030
404-371-5050

33PP

Question Presented

Whether the Antiterrorism and Effective Death Penalty Act of 1996's limit on future habeas corpus petitions by criminal defendants vitiates the need for the "in custody" requirement of 28 U.S.C. § 2254.

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Tam v. Georgia, No. 1:97-CV-1000 (Magistrate's Report and Recommendation Oct. 14, 1997).

Tam v. Georgia, No. 1: 97-CV-1000 (N.D. Ga. Dec. 19, 1997).

Tam v. Georgia, No. 98-8085 (11th Cir. Apr. 6, 1999) (per curiam).

Statement of Jurisdiction

Petitioner is filing this petition in response to the panel's denial of his appeal in a decision dated February 3, 1999. Appellant's petition for rehearing *en banc* was denied on April 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statutory Provisions Involved

The relevant provisions of Title 28 of the United States Code are reproduced at App., *infra*, 15-21.

Statement of Facts

Applicant Kin Siu Tam, M.D., was indicted on March 13, 1990, by the Newton County grand jury for unlawfully prescribing Valium, a controlled substance, and with fraudulently submitting claims in receipt for medical assistance.

Dr. Tam is a native of Canton Province in Communist China, and his primary language is Cantonese. He attended medical school at the Tutusin University College of Medicine in Canton, China, and subsequently immigrated to the United States. Dr. Tam has not received any of his formal education in the United States, nor has he taken any formal English classes in China or the United States. His only English training has been through self-education.

At the time of these indictments, Dr. Tam was on probation from a sentence imposed in 1988. After his arrest on or about March 16, 1990, he remained in the Newton County Jail until he entered guilty pleas to the 1990 charges on May 22, 1990.

While Dr. Tam was in jail, he suffered from severe hypertension, for which the jail physician prescribed Hydro-

chlorothiazide and Aldomet. Also while in jail, Dr. Tam suffered from pain and numbness in his right arm. An MRI revealed a cervical spine dislocation compressing a nerve. Dr. Tam had to pay for the MRI himself. However, Dr. Tam received no medication or other remedy to treat the pinched nerve. He was forced to wait until his release from jail to seek proper medical treatment, and visited a neurosurgeon at Grady Hospital in Atlanta immediately upon his release. In addition, Dr. Tam testified that he suffered from severe insomnia during his tenure in the jail.

Attorney James Alexander represented Dr. Tam on the 1990 charges. Mr. Alexander advised Dr. Tam to enter a guilty plea in exchange for Newton County District Attorney John Ott's recommendation that Dr. Tam serve a probated sentence and be banished from the state, rather than be incarcerated for any additional time. Mr. Alexander testified that if Dr. Tam had proceeded to trial, his probable trial date would have been in October, 1990, some five months later.

While Mr. Alexander testified that he and Dr. Tam discussed the nature of the charges and Mr. Alexander's reasons for recommending that Dr. Tam enter a guilty plea, Dr. Tam testified that he understood only that if he pled guilty, he would be released from jail and be free to seek further medical treatment. However, Dr. Tam testified that no one told him what would happen if he pled not guilty. Dr. Tam believed that he would stay at the county jail or move to a state prison.

Dr. Tam further testified that Mr. Alexander did not fully explain his right to a jury trial. He also testified that he did not fully comprehend the guilty plea form.

Dr. Tam additionally testified that he was under the influence of prescription drugs at the time of the guilty pleas. This testimony included answering "yes" to the question on the plea sheet: "Are you now under the influence of any drugs, medicine, or alcohol." At the plea hearing, when the

trial judge noted this fact, Dr. Tam nodded affirmatively. Mr. Alexander then interrupted and suggested that Dr. Tam was not presently under the influence of "any medication." District Attorney Ott then changed the Applicant's mark on the plea form from "yes" to "no."

The factual basis for the plea on unlawful prescribing of a controlled substance was ostensibly as follows:

> Your honor, the facts surrounding these charges show that pursuant to undercover drug operations on April the 17th of 1989 and on February the 6th of 1990, undercover agents went to Dr. Tam's office and were able to obtain Valium in each instance for no legitimate medical purpose. They went in there, one of them told him he just simply had trouble sleeping because he was taking uppers all week long and needed something to come down on weekends. In neither instance was there a legitimate medical purpose.

The factual basis for the pleas on the remaining eight counts of fraudulent submission of claims in receipt for medical assistance payments was as follows: "He is charged under the eight counts for fraudulent submission of claims in receipt for medical assistance payments for submitting to the State of Georgia forms claiming welfare payments back to him for welfare patients that had come to see him."

Newton County Superior Court Judge Ben F. Hendricks accepted Dr. Tam's guilty plea and sentenced him to ten (10) years probation on each count, running concurrently, fined him one thousand and fifty dollars ($1,050.00), and banished him for the State of Georgia. Additionally, as a result of the felony convictions, Dr. Tam's medical license was suspended. Dr. Tam did not appeal from the judgment of conviction. Dr. Tam's sentence was later modified so that it expired on October 17, 1993.

Dr. Tam is currently residing and working in Alabama. However, due to his suspended medical license, he is unable to practice his chosen profession, medicine. Since losing his medical license, Dr. Tam's inability to practice medicine has seriously affected his income and interfered with his freedom to practice a career in which he had an established liberty interest.

Appellant filed a Petition for Habeas Corpus pursuant to 28 U.S.C. § 2254 in the U.S. District Court for the Northern District of Georgia that was denied on December 19, 1997. App., *infra*, 9. Appellant timely appealed to the U.S. Court of Appeals, Eleventh Circuit. The Court of Appeals affirmed the District Court on February 3, 1999. App. *infra*, 1. A petition for rehearing *en banc* was denied on April 6, 1999. App., *infra*, 12.

Argument and Citation of Authority

Even Though Dr. Tam's Sentence Has Expired, Jurisdiction Over this Petition is Appropriate Due to the Collateral Consequences of Conviction, Including the Loss of His Medical License.

The writ of habeas corpus is shaped to guarantee the most fundamental of all rights, the legality of the detention of a person. *Peyton v. Rowe*, 391 U.S. 54 (1968). The statute does not limit possible relief that may be granted to the discharge of the applicant from physical custody. Rather, its mandate, that the court dispose of matters as law and justice require, is broad with respect to the relief that may be granted. *Carafas v. Lavallee*, 391 U.S. 234, 239 (1968). The *Carafas* court recognized that because Petitioner Carafas could not engage in certain businesses, serve as an official of a labor union for a specified period of time, vote in any election held in New York State, or serve as a juror, he

suffered collateral consequences of his conviction which survived satisfaction of the sentence imposed. Id. at 237.

Like the petitioner in *Carafas*, Petitioner has disabilities which flow from the fact of his conviction, regardless of whether his sentence expired. Foremost among these disabilities is the revocation of his medical license and thus the inability to pursue his chosen profession. "Because of these disabilities or burdens which may flow from petitioner's conviction, he has a substantial stake in the judgment of convictions which survives the satisfaction of the sentence imposed on him." *Carafas*, 391 U.S. at 238. The revocation of Dr. Tam's medical license is clearly a substantial stake in the judgment of conviction, and therefore this Court should exercise jurisdiction over his petition for writ of habeas corpus.

The Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (1996) (codified as amended at 8, 18, 22, 28 U.S.C.) (hereinafter referred to as "AEDPA"), radically changed the landscape of habeas corpus law by instituting an one-year statute of limitation for new habeas petitions. The new limitation period vitiates prior law requiring that a petition be "in custody" to file a Petition for Habeas Corpus. Prior to the AEDPA, the Supreme Court held that Writs of Habeas Corpus filed under 28 U.S.C. § 2254 after the termination of a defendant's sentence were not permissible, even when the defendant was suffering from collateral consequences as a result of his illegal conviction. *Maleng v. Cook*, 490 U.S. 488, 490-91, 109 S.Ct. 1923 (1989).

The primary rationale behind not allowing a petition for Habeas Corpus to continue when the Appellant's sentence has expired is one of public policy. The Federal Courts have restricted Habeas Corpus to cases where the petitioner is in custody in order to avoid being inundated by cases long expired. *Maleng*, 490 U.S. at 494. In *Maleng*, the Court's

primary concern was that by allowing a Habeas action to begin after the sentence has expired, it would grant a petitioner leave to appeal a past conviction at any point in time and would overly burden the courts.

However, the AEDPA limited 28 U.S.C. § 2254 by placing a one-year statute of limitation on filing Habeas Corpus Petitions. AEDPA, title 1, sec. 101, 110 Stat. at 1217 (codified as amended at 28 U.S.C. §2244). This short statute of limitations effectively removes any concerns the Courts may have about being overwhelmed by appeals from long-expired sentences. In order for a defendant to appeal via a new Writ of Habeas Corpus under § 2254, he must now file the Petition within one year of sentence. This new limitation on Habeas relieves the Supreme Court's concern about finality of convictions, and limits the stream of frivolous and unwarranted lawsuits by convicted defendants. Given that the Courts no longer have to worry about being inundated with pleas to overturn long-finished convictions, and in order to avoid a miscarriage of justice, Dr. Tam's Petition for Habeas Corpus should be free to go forward based on the collateral consequences of his conviction.

CONCLUSION

It should be remembered that "[t]he very nature of the writ [of Habeas Corpus] demands that it be administered with initiative and flexibility to insure that miscarriages of justice within its reach are surfaced and corrected." *Hensley v. Municipal Court*, 411 U.S. 345, 350, 93 S. Ct. 1571, 1574 (1973). Dr. Tam has suffered a miscarriage of justice that is within the reach of a Writ of Habeas Corpus and therefore can be corrected. The collateral consequence of Dr. Tam's conviction, *i.e.*, his inability to practice medicine, is more of an impediment on his everyday life than many inmates and probationers suffer. Since the AEDPA effectively limits the time in which future Habeas Corpus Petitions may be filed,

not allowing Dr. Tam's writ to proceed would be a miscarriage of justice because the custody requirement is no longer necessary to protect finality.

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Eleventh Circuit, and hold that Petitioner Tam may move forward on the merits of his Petition for a Writ of Habeas Corpus.

This the 1st day of July, 1999.

Respectfully submitted,

THOMAS M. WITCHER
Ga. Bar No.: 771800
Attorney for Petitioner
KIN SIU TAM, M.D.

WITCHER & WITCHER
118 East Trinity Place
Decatur, Georgia 30030
404-371-5050

APPENDIX

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[stamp: FILED; FEB 3 1999; THOMAS K. KAHN, CLERK; UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT]

No. 98-8085
Non-Argument Calendar

D.C. Docket No.: 1:97-CV-1000-WBH

KIN SIU TAM, M.D.,

Petitioner-Appellant,

versus

STATE OF GEORGIA,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

(February 3, 1999)

Before BLACK and HULL, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

Petitioner-appellant Kin Siu Tam appeals the district court's dismissal of his habeas corpus petition for lack of jurisdiction.

In 1990, Kin Siu Tam, a trained medical doctor, pled guilty in state court to two counts of unlawfully prescribing controlled substances and six counts of fraudulently submitting claims and receipts for medical assistance. He was sentenced to ten years probation on each count, concurrent, fined, and banished from the State of Georgia. As a result of the felony conviction, Tam's medical license was suspended. Tam's sentence was subsequently amended so that it terminated on October 17, 1993. He filed two state petitions for a writ of habeas corpus which were dismissed.[1]

Tam filed a petition for writ of habeas corpus in the federal district court in 1997. The district court concluded that it lacked jurisdiction to consider the petition because Tam was not "in custody."

On appeal, Tam maintains that the district court has jurisdiction due to the collateral consequences of his conviction. However, collateral consequences alone are insufficient to satisfy the "in custody" requirement of 28 U.S.C. 2254(a).[2]

Once federal jurisdiction has attached in a federal district court, jurisdiction is not defeated by a habeas corpus petitioner's release and the federal court can consider the petitioner's application for relief from collateral

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[1] Tam's first state habeas petition was filed on March 22, 1995, and was dismissed on January 29, 1996. R1-4 at 10. His second state habeas petition was filed on March 29, 1996, and was dismissed on October 28, 1996. Id.

[2] Maleng v. Cook, 490 U.S. 488, 492, 109 S.Ct. 1923, 1926 104 L.Ed.2d 540 (1989). 28 U.S.C. § 2254(a) states that "... a district court shall entertain an application for writ of habeas corpus in behalf of a person *in custody* pursuant to the judgment of a State court...." (emphasis added). Although Tam contends that the public policy supporting this section was removed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2244 and 2254), the Act did not change the wording of the "in custody" requirement.

consequences of his conviction.[3] However, that is not the situation in this case. Here, Tam filed his federal habeas corpus petition four years after his sentence had expired. Therefore, Tam was not "in custody" at the time when the petition was filed nor at any time during the pendency of the petition and federal jurisdiction did not attach while he was "in custody."

The district court correctly found that it lacked jurisdiction to consider the habeas petition. Therefore, the dismissal of Tam's petition for writ of habeas corpus is AFFIRMED.

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[3] Carafas v. LaVallee, 391 U.S. 234, 238, 88 S.Ct. 1556, 1560, 20 L.Ed.2d 554 (1968). Also see Maleng, 490 U.S. at 488, 109 S.Ct. at 1926 ("'in custody'" has never been extended to the situation where a habeas petitioner suffers no present restraint from a conviction.")

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[stamp: FILED; FEB 3 1999; THOMAS K. KAHN, CLERK; UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT]

No. 98-8085
Non-Argument Calendar

District Court Docket No.: 1:97-CV-1000

KIN SIU TAM, M.D.,

Petitioner-Appellant,

versus

STATE OF GEORGIA,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

Before BLACK and HULL, Circuit Judges, and CLARK, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED.

Entered: February 3, 1999
For the Court: Thomas K. Kahn, Clerk
By: "s/Matt Davidson"
Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: April 22, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[stamp: ENTERED ON DOCKET; OCT 16 1997; LDT, CLERK]

KIN SIU TAM, M.D. Petitioner, - versus - STATE OF GEORGIA Respondent.	CIVIL ACTION NO. 1:97-CV-1000-WBH HABEAS CORPUS 28 U.S.C. § 2254

REPORT AND RECOMMENDATION

Presently before the Court is Respondent's motion to dismiss for lack of jurisdiction and Petitioner's response thereto. [Docket Entry Nos. 4 and 7].

PROCEDURAL HISTORY

Petitioner was indicted by the Newton County grand jury for two counts of unlawful prescribing of controlled substances and six counts of fraudulent submission of claims and receipts for medical assistance. [Docket Entry No. 5, Respondent's Exhibit 10.] He was also charged in two accusations for two counts of fraudulent submission of claims and receipts for medical assistance. [Id.]. On May 22, 1990, Petitioner entered guilty pleas to all of these charges. [Id.]. Petitioner originally received consecutive sentences of five years' probation on each of the unlawful prescribing charges, and sentences of ten years' probation on each of the remaining charges to run concurrently to each other and the second five year sentence. [Id.]. On July 14, 1992, the trial court entered an order modifying these

sentences so that they would all terminate on October 17, 1993. [Docket Entry No. 5, Respondent's Exhibit 1].

Following two state habeas petitions, [Docket Entry No. 5, Respondent's Exhibits 2 and 4], Petitioner filed this federal petition for habeas corpus relief on April 16, 1997. [Docket Entry No. 1].

DISCUSSION

Respondent argues that the instant petition should be dismissed because Petitioner filed the action with this Court after his sentence expired and therefore he was not in custody of any judgment. Petitioner argues that this Court should entertain the petition because he is suffering present collateral consequences from the conviction.

28 U.S.C. § 2254(a) provides:

> The Supreme Court, a Justice thereof, a Circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

In order for this Court to have jurisdiction to entertain a petition for a writ of habeas corpus, the petitioner must be "in custody" at the time the petition is filed. Maleng v. Cook, 490 U.S. 488, 490-91, 109 S.Ct. 1923, 104 L.Ed. 540 (1989). Federal district courts are without subject matter jurisdiction to consider petitions for habeas corpus relief filed after the sentence has fully expired. Maleng, 490 U.S. at 494. The Maleng Court noted that in a previous case, Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968), the Court held that a federal district court could entertain a habeas petition which was filed before the petitioner's sentence had expire, but which expired during the pendency of the petition, due to the ongoing collateral consequences of the expired conviction. Maleng, 490 U.S. at 491. The Maleng Court made clear, however, that a

petitioner is not "in custody" under a conviction which sentence has fully expired at the time petition is filed, and to hold otherwise would "stretch the language 'in custody' too far." Maleng, 490 U.S. at 491.

Petitioner's reliance on Carafas v. LaVallee, supra, is misplaced. The Carafas Court held that a federal district court should continue to entertain a petition when the petitioner's sentence fully expired during the pendency of the petition due to the collateral consequences of the conviction, such as consequences to employment. Carafas, 391 U.S. at 327. Although the loss of Petitioner's medical license is an ongoing collateral consequence of his conviction, Petitioner filed the instant petition after the sentence for that conviction fully expired. The Supreme Court has never extended the "in custody" requirement "to the situation where a habeas petitioner suffers no present restraint from a conviction." Garlotte v. Fordice, 515 U.S. 39, 45, 115 S.Ct. 1948, 132 L.Ed.2d 36 (1995), citing, Maleng, 490 U.S. at 492.

Because Petitioner's sentence fully expired on October 17, 1993, Petitioner was not in custody pursuant to a judgment of a state court when the petition was filed on April 16, 1997, and therefore this Court cannot entertain the petition.

CONCLUSION

Based on the foregoing, **IT IS RECOMMENDED** that Respondent's motion to dismiss [Docket Entry No. 5] be **GRANTED**, and the petition of Kin Siu Tam, M.D. [Docket Entry No. 1] be **DISMISSED** for lack of subject matter jurisdiction.

IT IS SO RECOMMENDED, this 14th day of October, 1997.

"s/Richard H. Deane, Jr."
Richard H. Deane, Jr.
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[stamp: FILED; DEC 19 1997; _____, CLERK]

KIN SIU TAM, M.D. Petitioner	CIVIL ACTION NO.
- versus -	1:97-CV-1000-WBH
STATE OF GEORGIA Respondent	HABEAS CORPUS 28 U.S.C. § 2254

ORDER

On May 22, 1990, Petitioner pled guilty to two counts of unlawful prescribing of controlled substances and six counts of fraudulent submission of claims and receipts for medical assistance. The trial court originally sentenced petitioner to two five year periods of probation, to run consecutively, on the unlawful prescribing charges and to two concurrent ten year periods of probation on the remaining counts. On July 14, 1992, the trial court amended the sentences so that all would terminate on October 17, 1993. Petitioner's first habeas corpus petition in Newton County Superior Court was dismissed on January 23, 1996. Before the Court is petitioner's Petition for a Writ of Habeas Corpus [1] and the magistrate judge's Report and Recommendation thereon [9].

If no objections are filed to the magistrate judge's Report and Recommendation, it is reviewed for plain error only. United States v. Slay, 714 F.2d 1093, 1095 (11th Cir. 1983), cert. denied, 464 U.S. 1050 (1984). If objections are filed, the Court must conduct a *de novo* review. Nettles v. Wainwright, 677 F.2d 404, 409 (Former 5th Cir. Unit B

1982). In this case, petitioner has objected to the Report and Recommendation; thus, the Court will conduct *de novo* review. After thorough and careful review, the Court agrees with the magistrate judge's conclusion that the Court lacks jurisdiction to entertain petitioner's habeas corpus application.

A federal district court has jurisdiction to entertain a habeas corpus petition only so long as the petitioner is in custody. Maleng v. Cook, 490 U.S. 488, 490-91, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989). In Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968), the United States Supreme Court extended the definition of a petitioner being in custody to include one whose sentence expired during the pendency of his habeas application. Here, petitioner filed his habeas application *after* his sentence expired, meaning that he was not in custody at the time of filing. Petitioner urges the Court to stretch Carafas, by extending the definition of in custody even further, and allow his habeas application even after his sentence is completed. Petitioner's argument turns on the contention that the loss of his medical license as a result of his conviction constitutes custody within the meaning of the habeas statute. The loss of petitioner's medical license is clearly a collateral consequence of his conviction. In Carafas, the Supreme Court recognized that collateral losses,[1] similar to those suffered here by petitioner, prevent a court from finding that a habeas petition is moot simply because the petitioner was released before his application had been fully adjudicated. Carafas, 391 U.S. at 237-38, 88 S.Ct. at 1559. This is so because the relief a court may grant under a habeas application goes beyond merely releasing the petitioner. See id., at 239, 1560. The Supreme Court then went on to

[1] As a result of his conviction, the petitioner in Carafas could not engage in certain business, could not serve as an official of a labor union, could not vote in any New York State election, and could not serve as a juror. Carafas, 391 U.S. at 237, 88 S.Ct. at 1559.

analyze whether, regardless of mootness, the petition was nonetheless barred because federal court jurisdiction was lost upon the petitioner's release from prison. Id. at 238-40, 1559-61. Noting that petitioner had filed his habeas petition four years prior to his release, the Court held that "once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application." Id. at 238, 1560. It stands then, that the timing of habeas claim involves the question of jurisdiction, while the collateral consequences of a conviction involve the question of mootness. Once jurisdiction has attached, the case will not be mooted as a result of the petitioner's release.

Here, however, jurisdiction never attached because petitioner's habeas application was not filed until after his release, and to extend definition of in custody to include cases where petitioner's sentence expires before the filing of habeas petition, is to negate totally the custody element. Adopting petitioner's definition would open the door to the filing of habeas petitions anytime a state imposed a negative ramification due to a conviction, even if such ramification was imposed or contested years after a person completed his sentence. Petitioner's sentence expired fully on October 17, 1993; therefore, petitioner was not in custody within the meaning to the habeas corpus statutes when he filed his application on April 17, 1997, and the Court is without jurisdiction to entertain the petition. Accordingly, the Court DENIES petitioner's habeas corpus application [1].

It is so ORDERED this 19th day of December, 1997.

"s/Willis B. Hunt, Jr."
Willis B. Hunt, Jr.
Judge, United States District Court

[stamp: ENTERED ON DOCKET; Dec. 22, 1997; LDT Clerk]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[stamp: FILED; APR 6 1999; THOMAS K. KAHN, CLERK; UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT]

No. 98-8085

KIN SIU TAM, M.D.,

Petitioner-Appellant,

versus

STATE OF GEORGIA,

Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

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Before BLACK and HULL, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Kin Siu Tam, M.D., is DENIED.

ENTERED FOR THE COURT:

"s/Thomas A. Clark"
SENIOR UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[stamp: FILED; APR 6 1999; THOMAS K. KAHN, CLERK; UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT]

No. 98-8085

KIN SIU TAM, M.D.,

Petitioner-Appellant,

versus

STATE OF GEORGIA,

Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F.2d _____).

Before BLACK and HULL, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

"s/Thomas A. Clark"
SENIOR UNITED STATES CIRCUIT JUDGE

TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE
PART IV - JURISDICTION AND VENUE
CHAPTER 81 - SUPREME COURT
Sec. 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch. 646, 62 Stat. 928; Pub. L. 100-352, Sec. 2(a), (b), June 27, 1988, 102 Stat. 662.)

TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE
PART VI – PARTICULAR PROCEEDINGS
CHAPTER 153 - HABEAS CORPUS
Sec. 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or,

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and,

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

(June 25, 1948, ch. 646, 62 Stat. 965; Pub. L. 89-711, Sec. 1, Nov. 2, 1966, 80 Stat. 1104; Pub. L. 104-132, title I, Sec. 101, 106, Apr. 24, 1996, 110 Stat. 1217, 1220.)

Sec. 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to

the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the

applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

(June 25, 1948, ch. 646, 62 Stat. 967; Pub. L. 89-711, Sec. 2, Nov. 2, 1966, 80 Stat. 1105; Pub. L. 104-132, title I, Sec. 104, Apr. 24, 1996, 110 Stat. 1218.)